

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE IN CLERK'S OFFICE
NASHVILLE DIVISION

APR 20 2004

BETH ANN BROWN,
et al.,

PLAINTIFFS,

v.

TENNESSEE DEPARTMENT OF
FINANCE & ADMINISTRATION, and
WARREN C. NEEL, Commissioner,
Tennessee Department of Finance &
Administration,

DEFENDANTS.

U.S. DISTRICT COURT
MID. DIST. TENN.

Civil Action
No. 3:00-0665
Judge Echols

AGREED ORDER

This class action was filed by six individual Plaintiffs and Tennessee Protection and Advocacy, Inc. on behalf of themselves and individuals with mental retardation and other developmental disabilities who are similarly situated to the Plaintiffs in this action, against the Tennessee Department of Finance and Administration and Dave Goetz, Commissioner of the Tennessee Department of Finance and Administration. The Brown Plaintiffs alleged that the Defendants were unlawfully depriving mentally retarded individuals of medically necessary care, resulting in class members' inappropriate hospitalization in state psychiatric facilities, needless deterioration and regression in health status, and loss of independence. The Brown Plaintiffs sought declaratory and injunctive relief under 42 U.S. C. Section 1983 to remedy Defendants' alleged systemic violations of the Medicaid Act. On May 1, 2001, the Court certified a class in Brown under Federal Rule of Civil Procedure 23 (b)(2). The Brown class comprises mentally

This document was entered on
the docket in compliance with
Rule 58 and / or Rule 79 (a).

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*retarded Tennessee residents who are eligible for Medicaid services under the ICF/MR program pursuant to 42 U.S.C. Section 1396a et seq. or for a home and community based services (HCBS) waiver for the mentally retarded and developmentally disabled pursuant to 42 U.S.C. Section 1396n, and who request services under these programs, but who (1) are denied the opportunity to apply for such services; (2) apply for services under these programs and are denied; or (3) are placed on a waiting list for services under these programs. Having been certified under Rule 23 (b)(2), the Brown class is mandatory, and its members may not opt out of the action.

Pending before the Court is the application of the plaintiffs and the defendants for approval of a settlement agreement resolving all claims. In its order of February 6, 2004, the Court preliminarily approved the agreement and authorized the notice to be sent to class members and the publication of notice to the plaintiff class. (Doc. No. 108).


At a fairness hearing held on April 12, 2004, the Court considered exhibits submitted by the parties, letters filed with the Court, testimony of witnesses and parties in support of the settlements, the statements of counsel for the parties, and the record as a whole. There was no testimony presented in opposition or as an objection to the settlements at the hearing. The procedural prerequisites for approval of a class action settlement have been met, Rule 23 (e), F.R.C.P., *Williams v. Vuckovich*, 720 F.2d 909 (6th Cir. 1983). The present agreement is the product of good faith, arms-length negotiations, is not illegal, and is reasonable. *Stotts v. Memphis Fire Dept.*, 679 F. 2d 541, 546 (6th Cir. 1982) *revd.* on other

grds. *sub nom. Firefighters Local 1784 v. Stotts*, 467 U.S. 561 (1984); *Aro Corp v. Allied Witan Co.*, 531 F. 2d 1368, 1372 (6th Cir. 1976), cert. den. 429 U.S. 862 (1976). The Court concludes that the following Settlement Agreement is "fair, adequate and reasonable", in light of its "fairness...to those affected, the adequacy of the settlement to the class, and the public interest", and that it should be approved. *Williams v. Vuckovich*, *supra*, 720 F. 2d at 921; *Tenn. Assoc. of Health Maintenance Organization, Inc. v. Grier*, 262 F. 3rd 559 (6th Cir. 2001).

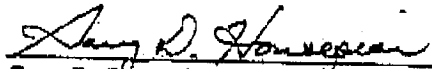
Further, the defendants shall pay plaintiffs' reasonable attorney fees as permitted under 42 U.S.C. §1988. The plaintiffs shall submit their application for a fee award for legal services rendered to date within 45 days of the entry of this order.

It is, therefore, ORDERED that the Settlement Agreement as attached as Exhibit A is approved.

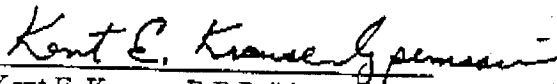
Entered this 15th day of June, 2004.


ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

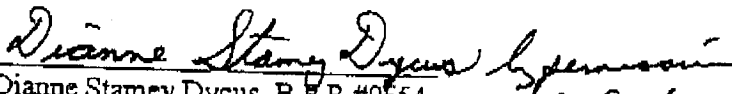
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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

BETH ANN BROWN,

et al.,

Plaintiffs,

v.

TENNESSEE DEPARTMENT OF
FINANCE & ADMINISTRATION, and
DAVE GOETZ, Commissioner,
Tennessee Department of Finance &
Administration,

Defendants.

Civil Action

No. 3:00-0665

Judge Echols

Mag. Judge Knowles

SETTLEMENT AGREEMENT1. Scope of Settlement

This Agreement is entered into by the Tennessee Department of Finance and Administration and the Commissioner of the Tennessee Department of Finance and Administration ("defendants") and Keith Greenwald, by and through his mother and next friend, Carol Greenwald; Shane Mitchell, by and through his mother and next friend, Arlie Mitchell; Derrick Vartan, by and through his mother and next friend, Nancy Vartan; Katherine Wilcox, by and through her mother and next friend, Dora Wilcox; and Tennessee Protection and Advocacy, Inc. ("plaintiffs"). The plaintiffs filed this action on their own behalf and on behalf of all other persons similarly situated asserting violations of Medicaid law by defendants' alleged failure to

provide Medicaid services with reasonable promptness to eligible individuals with mental retardation. A class has been certified in this matter to include:

Tennessee residents with mental retardation who are eligible for Medicaid services under the ICF/MR program pursuant to 42 U.S.C. §1396a or a Home and Community Based Services waiver for the Mentally Retarded and Developmentally Disabled pursuant to 42 U.S.C. §1396n, who request services under these programs but (1) are denied the opportunity to apply for such services; (2) whose application for services under these programs is denied; or (3) are placed on a DMRS waiting list for services under these programs.

This agreement is intended to resolve all issues in dispute in this action.

II. Preamble and Guiding Principles

The parties enter into this Agreement recognizing that their overriding common interest is in assuring that Tennessee's citizens with mental retardation are provided reasonable opportunities to grow and develop, exercise independence, and lead full and productive lives in a safe environment. The parties also recognize the critical role of families in supporting individuals with mental retardation and want to support families by providing individuals with mental retardation at least a moderate level of services to supplement other natural supports and help reduce the need for crisis-driven, more intensive long-term care services. The system of delivering these services should promote consumer and family choice of available services. The parties recognize that individuals with mental retardation eligible for ICF/MR level of care have been placed on waiting lists for mental retardation services. This Agreement is intended to eliminate or substantially reduce the waiting list for services by providing for: (1) the

development of the mental retardation system infrastructure and provider network capacity necessary to support the expansion of quality home and community based waiver services; (2) access to interim services for Medicaid-eligible individuals seeking services; and (3) an appropriate planning process for the future expansion and/or development of home and community based waiver programs and services for Medicaid-eligible persons with mental retardation on the DMRS waiting list. While defendants cannot fully anticipate the rate of growth of the DMRS waiting list, the amount of legislative appropriations for home and community based MR services, or the maximum number of waiver participants that will be approved by the Centers for Medicare and Medicaid Services (CMS), the goal is to eliminate or substantially reduce the waiting list for services for Medicaid-eligible persons with mental retardation that meet the ICF/MR level of care criteria. The defendants' commitment is to: 1) work toward lifting the moratorium on new admissions to the existing home and community based MR waiver program as soon as possible; 2) develop MR service system infrastructure; 3) apply for new waivers so that the DMRS waiting list will move at a reasonable pace; and 4) strive to provide services to Medicaid-eligible persons with mental retardation that meet the ICF/MR level of care criteria on the waiting list with reasonable promptness. It is defendants' intent to reach the goals of this Agreement without reducing the funding for other services to individuals with mental retardation.

III. Definitions and Terms

A. "Plaintiffs" means the members of the Class certified under Rule 23, Federal Rules of Civil Procedure, by Order of this Court:

Tennessee residents with mental retardation who are eligible for Medicaid services under the ICF/MR program pursuant to 42 U.S.C. §1396a or a Home and Community Based Services waiver for the Mentally Retarded and Developmentally Disabled pursuant to 42 U.S.C. §1396n, who request services under these programs but (1) are denied the opportunity to apply for such services; (2) whose application for services under these programs is denied; or (3) are placed on a DMRS waiting list for services under these programs.

B. "Defendants" means the State of Tennessee and the other named defendants:

Tennessee Department of Finance and Administration and Dave Goetz, Commissioner of the Department of Finance and Administration.

C. "Individual" means a person with mental retardation eligible for ICF/MR level of care.

D. "Guardian" means the legal guardian of an individual under the age of 18 or the conservator of an individual 18 or over. The term "guardian" and "conservator" may be used interchangeably.

E. "Waiting List" refers to the list maintained by the Division of Mental Retardation Services (DMRS) that includes individuals determined to be eligible for and seeking services under the ICF/MR program pursuant to 42 U.S.C. §1396a or a Home and Community Based Services waiver for the Mentally Retarded and Developmentally Disabled pursuant to 42 U.S.C. §1396n.

F. "Complaint" means the First Amended Complaint filed in this lawsuit.

G. "Crisis" is a category of need which means the individual needs services immediately due to the most intense needs with one or more of the following criteria being met: (1) homelessness; (2) death or incapacitation of all available caregivers; or (3) immediate danger to self or others.

H. "Urgent" is a category of need which means the individual needs services soon and meets one or more of the following criteria: (1) aging or failing health of caregiver and no alternate caregiver is available to provide support; (2) living situation presents a significant probability of abuse or neglect; (3) increasing risk of aggressive or assaultive behavior toward self or others; (4) stability of current living situation is severely threatened due to extensive support needs or family catastrophe; or (5) discharge from other service system (including but not limited to: school, DCS, RMHL, Forensics) is imminent.

I. "Active" is a category of need which means the person and/or conservator/guardian is requesting services as of now but does not have the intensive needs which meet the criteria for "crisis" or "urgent".

J. "Deferred" is a category of need which means the individual's need for services is more than one year away.

The parties recognize that the definitions of "crisis," "urgent," "active" and/or "deferred" as categories of need may need to be modified during the term of this Agreement. The parties agree that defendants may change and/or modify these definitions during the term of this Agreement with the consent of the plaintiffs without requiring Court approval.

IV. Expansion of Medicaid Waiver Program

A. By January 1, 2004, defendants will develop, submit and seek approval of an application to the Centers for Medicare and Medicaid Services (CMS) for a new Medicaid Self-determination Waiver program. The application will be submitted to plaintiffs for review and comment at least 30 days prior to submission. Defendants shall give good faith consideration to

comments and recommendations provided by plaintiffs within 30 days and will provide an explanation in writing if plaintiffs' suggestions are not adopted. This Self-determination Waiver will emphasize individual and family control and choice and will have a capped cost of \$30,000 per person per year in the first year and be at the amount approved by CMS for the remaining years consistent with the approved waiver application. An individual budget will be established for the individual based on the individual's level of need. Once an annual budget is established, he or she may develop and/or modify the service package without defendants review so long as the services selected are based on need and billable under the waiver and the individual's annual budget is not exceeded. Defendants will establish a process permitting an individual to exceed his or her budget under exceptional circumstances so long as the \$30,000 cap per person per year is not exceeded. The proposed process will be submitted to plaintiffs for review and comment prior to implementation. Defendants shall give good faith consideration to comments and recommendations provided by plaintiffs within 30 days and will provide an explanation in writing if plaintiffs' suggestions are not adopted. To the extent that approval from CMS may be obtained, individuals/guardians may control their services under this waiver using self-determination principles. Individuals whose needs cannot be met by this Self-determination Waiver will have the option to choose services through any other waiver for which they are eligible, as provided in paragraph IV.C.

B. Defendants will provide funding for and shall enroll and begin the provision of services for 600 enrollees in the Self-determination Waiver during the first year after approval of such waiver. Enrollment will be phased in throughout the year and potential enrollees will be identified in the crisis and urgent categories with the priority being given to those in the crisis

category and then with those in the urgent category with the most intense needs. If there remains funded slots available, then priority will be given to those in the active category that have been waiting the longest in that category. Enrollment will begin July 1, 2004 or upon approval of the waiver application by CMS, whichever is later. During the second year after approval of the Waiver, defendants will provide funding for and shall enroll and begin the provision of services for an additional 900 enrollees through this Waiver. Potential enrollees will be identified in the crisis and urgent categories with the priority given to those in the crisis category and then with those in the urgent category with the most intense needs. If there remains funded slots available, then priority will be given to those in the active category that have been waiting the longest in that category.

C. For State fiscal year 2003-04, defendants will continue to enroll eligible individuals, meeting the approved exceptions to the moratorium, if applicable, in the existing Home and Community Based Services Waiver as provided in the improvement funding in the current annual budget in the amount of \$12 million. For fiscal year 2004-05, defendants will provide the same level of improvement funding in the annual budget in the amount of \$12 million to allow the enrollment of additional eligible individuals in the existing Home and Community Based Services Waiver. Participants in this waiver will be limited to individuals whose needs cannot be met through the new Self-determination Waiver. Participants will need to meet eligibility requirements, including approved exceptions to the moratorium, if applicable, for enrollment in this waiver. For fiscal year 2005-06, defendants will again provide the same level of improvement funding in the annual budget in the amount of \$12 million to allow the enrollment of additional eligible individuals in the existing Home and Community Based Services Waiver.

Potential enrollees will be identified in the crisis and urgent categories with the priority given to those in the crisis category and then with those in the urgent category with the most intense needs. If there remains funded slots available, then priority will be given to those in the active category that have been waiting the longest in that category.

D. Within six months following the approval of this agreement, defendants will develop a methodology and process to define how individuals may move from the Self-determination Waiver to the existing Home and Community Based Services Waiver. Should there be other mental retardation waivers developed by the defendants and approved by CMS, defendants will also develop a methodology and process to define how individuals may move to and from that waiver to the other existing waivers. In addition, within six months following the approval of this agreement, defendants will define a methodology for accessing a limited amount of short-term crisis and/or one-time diversion funds that can be used to provide temporary additional services beyond the \$30,000 cap per person per year of the Self-determination Waiver. These proposed methodologies and processes for movement between waivers and the short-term crisis and/or one-time diversion funds will be submitted to plaintiffs for review and comment prior to implementation. Defendants shall give good faith consideration to comments and recommendations provided by plaintiffs within 30 days and will provide an explanation in writing if plaintiffs' suggestions are not addressed.

V. Service Delivery Timelines and Reasonable Promptness

A. The parties agree that individuals determined eligible for and seeking services under the ICF/MR program pursuant to 42 U.S.C. Section 1396a or a Home and Community Based

Services waiver should be provided those services that have been determined to be medically necessary with reasonable promptness. The parties also agree that, within the limits of the federally approved waivers, to the extent that there exists an available waiver slot and funding for that slot, eligible individuals should be enrolled in the Waiver with reasonable promptness. This settlement agreement is intended to accomplish the goal of eliminating or substantially reducing the waiting list for services for all Medicaid-eligible persons with mental retardation that meet the ICF/MR level of care criteria that seek services under the ICF/MR program pursuant to 42 U.S.C. Section 1396a or a Home and Community Based Services waiver.

B. In accordance with the provisions of Section IV for the Self-determination Waiver and the number of slots funded for Year 1, 600 slots, defendants will identify, notify, and enroll persons in the waiver. Defendants shall initiate this process in a timely manner so that 600 individuals can be phased in and enrolled in Year 1. Upon notification being sent to the individual, "reasonable promptness" means that services will be initiated within 30 days of the letter to eligible persons in the "crisis" category choosing to be enrolled in the Waiver. Upon notification being sent to the individual, "reasonable promptness" means that services will be initiated within 90 days of the letter to eligible persons in the "urgent" or "active" category choosing to be enrolled in the Waiver. This same process and standards for "reasonable promptness" shall continue in Year 2 so that an additional 900 eligible persons will be enrolled and receive services with the reasonable promptness from the date of notification by defendants. The same standard of reasonable promptness shall continue to apply for the duration of this agreement for persons seeking services under the Self-determination Waiver.

C. In accordance with the provisions of Section IV for the existing Home and Community Based Waiver and the improvement funding in the annual budget for the current year, defendants will identify, notify and enroll persons in this waiver. It is recognized that there may be a moratorium on the enrollment of new admissions to this waiver and that only those meeting the criteria of "crisis" may be enrolled in that waiver. Defendants will exercise best efforts to identify those who could meet the requirements for the "crisis" category. Defendants shall initiate this process in a timely manner so that all eligible individuals, within the limits of funding, can be enrolled in current year. Upon notification being sent to the individual that they are eligible under the crisis category, "reasonable promptness" means that services will be initiated within 30 days of the letter of notification to eligible persons choosing to be enrolled in the Waiver. Should the moratorium be lifted so that those in "urgent" or "active" category may be served, "reasonable promptness" means that services will be initiated within 90 days of the letter of notification to eligible persons choosing to be enrolled in the funded slot of the Waiver.

D. This same process and standards for "reasonable promptness" shall continue in Year 1 and Year 2 so that additional eligible persons will be enrolled and receive services with the reasonable promptness from date of notification by defendants within the improvement funding in the annual budget. The same standard of reasonable promptness for enrollees shall continue to apply for the duration of this agreement for persons seeking services under the existing Home and Community Based Waiver.

E. For any additional waivers that are sought and receive approval from CMS for the duration of this agreement, the same standards of reasonable promptness as provided in paragraph V.C. will apply.

VI. Program Improvements

A. Within three months following the approval of this Agreement, defendants will contract with an independent agency to perform an assessment of those persons on the waiting list as of that date. This assessment will verify names, addresses, overall health status and functional limitations as well as classifications of need for those persons on the waiting list. The State shall accumulate, compile and share with plaintiffs' counsel a report of this information.

B. Within six months following the approval of this Agreement, defendants will implement a targeted case management program that will be available to all Medicaid-eligible individuals on the waiting list. Policies and procedures will be established, with input from consumers, family members and advocates, to provide persons and their families with information about the MR waiver program and assistance as necessary to complete application forms, gather information and connect people to generic community services; provide follow-up and ongoing contact and assistance as needed or requested; and provide referrals to advocacy and support groups as requested or required. Training curriculum for case managers will be developed with input from consumers, family members and advocates. Enrollment will be phased in throughout the year.

C. Within three months following the approval of this agreement or July 1, 2004, whichever is later, defendants will develop a program to provide consumer directed support to each individual who is on the waiting list in the crisis, urgent or active category but not currently receiving family support services. Beginning July 1, 2004, consumer directed support will be capped at an amount of \$2280 per person per year not to exceed a total fiscal year annual expenditure of more than \$5 million. Enrollment will be phased in throughout the year.

D. There shall be additional interim services provided to the plaintiffs if the defendants have not obtained CMS approval and began enrolling persons in the Self-determination Waiver by July 1, 2004. For each month that the State has failed to obtain approval and begin enrollment, the defendants will provide \$500,000 per month in state funds to serve Medicaid-eligible individuals on the DMRS waiting list who meet ICF/MR level of care criteria as determined through the Pre-Admission Evaluation (PAE) process. No person shall receive more than \$30,000 per year interim services. Persons receiving interim services may be transitioned to the Self-determination Waiver upon approval of the waiver by CMS.

E. Defendants will immediately begin implementation of measures to address community infrastructure needs. The infrastructure development plan will include measures designed to address the service system design, including service coordination, quality assurance, stakeholder communication, and fiscal accountability; as well as provider network capacity. These measures will be designed to assist the defendants' in obtaining relief from the moratorium by CMS for new admissions to the existing Home and Community Based Services Waiver. Defendants agree to exert their best efforts to obtain relief from this moratorium and shall report to the parties at least quarterly the status of those efforts. If the defendants have not achieved complete relief from the moratorium by July 1, 2005, the plaintiffs, at their sole option, may declare this Agreement dissolved and thereafter request the Court to set a case management conference to set a scheduling order and trial date.

VII. Long Range Planning

Within twenty-four months following approval of this agreement, plaintiffs and

defendants will meet and reach agreement on expansion of enrollment and provision of services for the third, fourth and fifth years following approval of these waivers. Services will be expanded at a reasonable rate such that the waiting list will be eliminated or substantially reduced by the conclusion of the term of this agreement. If no agreement is reached for the third, fourth and fifth years expansion of enrollment and provision of services within one hundred twenty (120) days after the initial meeting pursuant to this paragraph, either party may request a mediation conference with the Magistrate Judge assigned to this case. Upon declaration of an impasse by the Magistrate Judge, the matter shall be set for a case management conference to set a scheduling order and enter a trial date.

VIII. Application Process

A. Defendants will ensure that any individual who wishes to do so may apply for Title XIX Home and Community Based Waiver Services. Pre-admission evaluation applications will be available in DMRS offices maintained in each of the three grand regions of the State for an eligibility determination. An eligibility determination will be made within 90 days of the date the application is completed, subject to the provisions of 42 C.F.R. §435.911 (a)-(e). Individuals determined eligible will be served with reasonable promptness after determination of eligibility in accordance with the provisions of this Agreement. Within three months of the approval of this Agreement, the Division will establish procedures for intake for individuals who request long-term support services, including classification, as well as procedures for determination of priority for services. These procedures will be designed to ensure prompt determination of eligibility for Medicaid ICF/MR and alternative services; ensure a prompt and appropriate assessment of need

in order to prioritize services; and ensure that persons applying for services are provided adequate and appropriate information to allow a full understanding of the application process. These procedures will be submitted to plaintiffs for review and comment prior to implementation. Defendants shall give good faith consideration to comments and recommendations provided by plaintiffs within 30 days and will provide an explanation in writing if plaintiffs' suggestions are not adopted.

B. At the time of the application, and at the time of any inquiry about services, the applicant will receive a Statement of Rights. In addition, at the time of the application, the applicant will receive a Consumer/Family Handbook. The Consumer/Family Handbook will provide the applicant with a clear description of the waiver program, including information about services, eligibility and appeal rights when eligibility or services are denied or when waiting list classification is disputed. Contact information will be included to provide a mechanism for obtaining additional information as needed. The targeted case manager for the applicant shall provide information consistent with Section V-B and make all reasonable efforts to accomplish the objective that the applicant understands their rights under this agreement and is encouraged to exercise their rights, consistent with Section V-C. The Consumer/Family Handbook and the Statement of Rights will be developed by defendants within three months following the approval of this agreement. Family members and consumers have been involved in the development and review of the Consumer/Family Handbook. The Statement of Rights will be submitted to plaintiffs for review and comment prior to implementation. Defendants shall give good faith consideration to comments and recommendations provided by plaintiffs within 30 days and will provide an explanation in writing if plaintiffs' suggestions are not adopted.

C. If eligibility is denied, services delayed, or the individual objects to his or her classification with regard to urgency of need for services, the individual has a right to a hearing as provided in the Statement of Rights to appeal such eligibility, delay in services, or classification decision.

IX. Monitoring and Enforcement

A. Reporting.

Upon completion of the assessment as provided in V.A., the defendants will provide a report to plaintiffs listing the names and addresses of all individuals on the waiting list. The report will include the category of need (crisis, urgent, active or deferred) of each individual, as well as the region in which the individual currently lives. Defendants shall provide a monthly written report to the plaintiffs listing the number of persons on the waiting list by region and category of need; the number of individuals removed from the waiting list by region and the reason for removal; and the number of individuals added to the waiting list by region. In addition, representatives of the defendants and plaintiffs shall meet monthly to discuss the implementation of this agreement. The frequency of these meetings may be reduced by mutual consent of the parties. At these meetings, the defendants will seek input from the intended beneficiaries regarding the effectiveness of the steps being taken to implement this agreement. It is envisioned that free, open and frank discussion of problems, limitations and successes will further the achievement of the goals of this agreement. In the event plaintiffs feel that the information provided is not sufficient, the parties agree that informal discovery will be available to the plaintiffs and may include inspection of documents and the operations formulated and

established by the defendants to comply with the requirements of this agreement. Defendants will make available appropriate knowledgeable staff and/or contractors, upon reasonable notice, to answer questions of plaintiffs' counsel concerning the compliance with this agreement. The scope of such informal discovery shall be such as is reasonably related to the exercise of due diligence by plaintiffs' counsel in fulfilling their responsibilities to protect the interests of the plaintiff class. The plaintiffs shall discharge these responsibilities in a manner which does not impose unreasonable delay, disruption, or administrative burden upon the defendants.

B. Discovery, Enforcement and Order Modification.

1. Defendants shall bear all costs related to copying or otherwise supplying the parties or their attorneys with documents requested that relate to the defendants' compliance with this Agreement. The identities of citizens shall be kept confidential, and neither the names nor likenesses of citizens shall be publicized without their permission except that the parties may refer to a citizen by the citizen's first name and last initial.

2. Nothing in this Agreement shall preclude any party from conducting additional discovery pursuant to the Federal Rules of Civil Procedure, such as, but not limited to, depositions or requests for admissions, on matters relating to enforcement or compliance with the Agreement. Defendants may seek relief from the Court in the event that defendants believe a party's discovery activities are unreasonable or inconsistent with this Settlement Agreement. In the event of a discovery dispute, the parties shall submit the dispute to the magistrate judge to whom the case is assigned for case management.

3. The Court shall retain jurisdiction of this action for all purposes under this Agreement until this action is dismissed.

4. The parties intend this Agreement to be a binding contract. The parties will attempt to resolve any claim of non-compliance with this Agreement or any other disputes concerning implementation of this Agreement through negotiations. An attempt at informal resolution, as described below, will be a prerequisite to either party's request for relief from the court for any claim of non-compliance with this Agreement or any other disputes concerning implementation of this Agreement. The parties agree that before the plaintiffs seek any other relief from the Court for non-compliance, the plaintiffs shall first obtain an order for specific performance under the process outlined in D.X.B.(5).

5. Before relief is sought from the court, the following process will be used by the parties:

- a. Either party claiming that non-compliance or any other disputes concerning implementation has occurred under this Agreement will give notice of the claim in writing to opposing counsel and will propose a resolution of the issue to the other party.
- b. The responding party will have fifteen (15) days following receipt of the written claim to respond in writing, unless the period is enlarged by agreement of the parties.
- c. If the parties are unable to reach an agreement as to any alleged non-compliance, any party may request a mediation conference with the Magistrate Judge assigned to this case.
- d. In the event that efforts at conciliation and mediation are unsuccessful, the party asserting the claim of non-compliance may, after providing fourteen (14) days written notice to opposing counsel, pursue relief before the United States District Court for the Middle District of Tennessee. After two years following the approval of this Agreement, defendants may defend any action for non-compliance on the grounds that defendants are

in compliance with the federal laws that are the basis of the underlying action which is the subject of this Agreement.

e. As to members of the plaintiff class, the systemic remedy established in this agreement shall not deprive any individual of rights afforded by the laws cited herein. This agreement shall not affect the right of any class member to seek any and all relief that is otherwise available through administrative review proceedings authorized by state and federal law, or through proceedings against the state before the Tennessee Claims Commission based upon alleged actions or omissions of the defendants. The parties acknowledge that the defendants may assert any and all defenses available in any such administrative, claims commission or other litigation.

This agreement is intended to adjudicate with respect to the plaintiff class and its individual members those claims for class-wide equitable relief which were made on their behalf in the complaints, and thus to bar separate proceedings against these defendants by class members seeking the same relief under 42 U.S.C. Section 1983. However, in the event that it appears that the plaintiff class is threatened with irreparable harm, the plaintiffs may apply for a modification of this agreement, and its implementing order, as necessary to prevent such harm, so long as such modification remains consistent with federal law, the intent of this agreement and its implementing orders, and the applicable standards for modification of such an agreement ordered by the Court.

6. Plaintiffs' counsel shall also monitor the agreement in the companion case of *People First v. Neel, et. al.*, (Case No. 3:01-0272, M.D. Tenn., Judge Echols). Defendants agree and confirm that they will not assert any defenses of lack of standing or similar jurisdictional

defenses in opposition to the monitoring activities of the *People First* agreement by plaintiff's counsel or any resulting enforcement action.

X. Attorney Fees, Expenses and Costs

The parties agree that the plaintiffs are prevailing and successful parties for the purposes of an award of attorney fees under 42 U.S.C. §1988 for legal services rendered by their counsel in connection with these proceedings. As such, they may seek to recover their reasonable attorneys fees and costs incurred in connection with this litigation. Defendants reserve their right to object to all or any part of plaintiffs' fee request on any basis. In the event that the parties cannot agree to the amount of reasonable attorney fees, expenses and costs, as defined above, plaintiffs shall file a fee application with the court within ninety (90) days of the effective date of this Agreement. Plaintiffs may file subsequent fee applications at later dates and it is acknowledged that plaintiffs will incur reasonable attorney fees, expenses and costs in order to monitor, enforce, and plan for the duration of this agreement. The Court will retain jurisdiction, pursuant to this Agreement, of all matters, including attorney fees and expenses.

XI. Miscellaneous Provisions

A. This Agreement is the compromise of disputed claims and shall not be deemed to be an admission of liability or wrongdoing by any party for any reason. The relief set forth in this Agreement constitutes full and final relief for each plaintiff and other similarly-situated individuals, on the claims set forth in plaintiffs' Complaint, as amended, up to and including the effective date of this Agreement.

B. The rights and obligations of this Agreement shall inure to the successors and assigns of the parties.

C. If any action beyond the control of the defendants, such as a change in State or federal law or action by a federal governmental agency, prohibits the defendants from performing a material provision of this Agreement, the remaining parts shall not be affected and shall remain in full force and effect.

D. This Agreement contains the entire agreement between the parties. The Agreement may not be modified except in writing.

E. If the federal government, through Congress, the Centers for Medicare and Medicaid Services, or otherwise, imposes different or additional requirements upon states than those currently in place regarding the provision of mental retardation services, the protections to be afforded individuals with mental retardation, or other matters within the purview of this Agreement, this Agreement shall not limit the defendants' responsibility to comply with such requirements.

XII. Term of Agreement

A. This Agreement shall in no way prejudice the State's right or ability to exercise its option to eliminate from its Medicaid state plan coverage for services in an intermediate facility for the mentally retarded, and in such event this Agreement shall cease to have any force and effect. Defendant will provide the other parties' counsel with 45 days notice of any such proposed change. Similarly, this Agreement does not prejudice plaintiffs' right, if any such right

exists, to oppose on any grounds available to them under the law any effort by the defendant to eliminate such optional benefits from its Medicaid state plan, nor does it prejudice the plaintiffs' right, if any such right exists, to seek any relief available to them under the law with respect to such changes.

B. Provided this Agreement has not been dissolved pursuant to section VI.E or paragraph A of this section, this Agreement shall terminate on December 31, 2009, unless extended in writing. The plaintiffs may seek to continue the jurisdiction of the Court and to pursue any of the relief requested in this lawsuit only if they can show substantive noncompliance in the defendants' implementation of this agreement. In any motion to continue the jurisdiction of the Court, plaintiffs must demonstrate that alleged breaches and any proposed cure were fully disclosed to the defendants, consistent with the provisions set forth in section VIII.B., that the action requested by plaintiffs is required by existing law, and the defendants have refused to take the action required by law. Such relief may not be sought after the scheduled dismissal of the litigation. Absent allegation of noncompliance in the defendants' implementation of this agreement in a pending motion, the Court will dismiss this lawsuit with prejudice on December 31, 2009. Dismissal with prejudice shall not preclude a future action based on the defendants' failure to comply with State or Federal law subsequent to December 31, 2009.

Dated this 17th day of December, 2003.

THIS SETTLEMENT IS HEREBY AGREED TO:

FOR THE PLAINTIFFS:



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